United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit of Mailing

75-4073

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4073

CORAZON HERMOSA,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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MARY P. MAGUIRE,
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CORAZON HERMOSA,

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Statement of the Issue

Did the Board of Immigration Appeals abuse its discretion by declining to reopen the deportation proceeding in order to permit the alien to apply for suspension of deportation?

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Corazon Hermosa petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on April 17, 1975, denying her motion to reopen the deportation proceedings.

The petitioner had sought to reopen the deportation proceeding in order to apply for the discretionary relief of suspension of deportation pursuant to Section 244(a)

(1) of the Act, 8 U.S.C. § 1254(a)(1). The Board denied the motion to reopen on the ground that petitioner had failed to establish a prima facie showing that the relief sought was warranted.

Statement of the Facts

The petitioner is a thirty-two year old alien, a native and citizen of the Philippines. She entered the United States on December 20, 1966 as a non-immigrant student and was authorized to remain in the United States until June 22, 1968. She remained beyond her authorized period without permission and, despite several attempts by the Immigration and Naturalization Service (the "Service") to locate her between October 1968 and June 1970, her whereabouts were not ascertained until June 30, 1970, on which date deportation proceedings were instituted against her by the issuance of an order to show cause and notice of hearing (T. 25).* At the deportation hearing held on July 14, 1970 petitioner, through her attorney, claimed that she was a national of the United States. In a decision and order dated July 15, 1970 the Immigration Judge found that there was no legal basis for petitioner's claim to United States nationality and found petitioner deportable as charged (T. 24). Petitioner was granted the privilege of voluntary departure until August 14, 1970 and the Immigration Judge entered an alternate order of deportation to the Philippines in the event she failed to depart by the prescribed date (T. 23). By a decision dated February 8, 1971 the Board of Immigration Appeals (the "Board") dismissed petitioner's appeal from the order of the Immigration Judge (T.) and on June 12, 1972 this Court dismissed a petition to review the Board's final order of deportation. Petitioner

* References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record filed with the Court.

was then granted until September 16, 1972 to effect her voluntary departure (T. 17). She failed to do so and on November 16, 1972 a warrant of deportation was issued (T. 16).

On September 19, 1972 petitioner moved to reopen her deportation proceedings on the ground that she was a citizen of the United States. On April 19, 1973, before the motion was acted upon, she filed an application for political asylum alleging that she would be persecuted for her political beliefs in the Philippines (T. 14). On September 28, 1973 the Board entered a decision and order denying the motion to reopen and found petitioner's claim to United States citizenship to be without merit (T. 13). On July 31, 1974 the petitioner's application for political asylum was denied by the Attorney General.

On May 28, 1974, while her application for political asylum was pending, petitioner moved to reopen her deportation proceedings so that she could apply for suspension of deportation pursuant to Section 244 of the Immigration and Nationality Act (the "Act") since she had resided in the United States for more than seven years (T. 11). By a decision and order dated September 13, 1974 the Board denied the motion to reopen and found that petitioner had failed to set forth a prima facie case for either suspension of deportation or for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h) (T.).

On April 10, 1975 the Service located the petitioner and arrangements were made to immediately deport her to the Philippines. However, shortly after the petitioner's flight departed from New York's Kennedy International Airport a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of New York and, following a conference with Judge Pierce, to whom the case was assigned, the Service had

petitioner removed from the flight during a stopover in San Francisco.

On April 10, 1975, immediately after the petitioner's apprehension, another motion to reopen the deportation proceedings was filed by petitioner (T. 9). The Board denied a stay pending a determination of the motion to reopen (T. 4) and on April 17, 1975 denied the motion to reopen for failure to make a prima facie showing for reopening (T. ....). On April 16, 1975 this petition to review an order of the Board dated April 15, 1975 * was filed and the petitioner's deportation was stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statute

Immigration and Nationality Act, 63 Stat. 163 (1952) as amended:

Section 244(a)(1), 8 U.S.C. § 1254(a)(1)—

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person

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* It appears that petitioner's attorney was somewhat hasty in filing this petition for review, possibly to be certain that the petitioner's deportation would be stayed by statute.

of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

Relevant Regulation

Title 8, Code of Federal Regulations (CFR):

§ 3.2 *Reopening or reconsideration.* The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner, or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not avoidable and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it apears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearings unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

* * * * *

ARGUMENT

The Board of Immigration Appeals did not abuse its discretionary authority in declining to reopen the deportation proceeding to permit the alien to apply for suspension of deportation.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. 3.2, provides in pertinent part that motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose

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* Section 103(a) of the Act, 8 U.S.C. § 1103(a).

would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence she offered in support of her motion.

B. Suspension of deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. § 1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. § 1254(c); *McGrath* v. *Kristensen*, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.*

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); *Kimm* v. *Rosenberg*, 363 U.S.

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* The qualifying relative must be the alien's spouse, child or parent. Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1).

405 (1960), *rehearing denied*, 364 U.S. 854; *Brownell* v. *Cohen*, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. *Hintopoulos* v. *Shaughnessy*, *supra*; *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ng* v. *Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860. Accordingly, when making her motion to reopen, it was incumbent upon this petitioner to offer evidence to show not only that she was statutorily eligible, but that she merited the extraordinary relief she sought as a matter of discretion.

C. The evidence offered in support of the alien's motion did not warrant reopening.

In support of her motion, the alien offered to prove that she had been physically present in this country for over seven years, and that deportation would be an extreme hardship to herself because of her prolonged residence in the United States; her anticipated difficulty in obtaining employment in the Philippines; the fact that her sister is a lawful permanent resident of the United States; and the fact that she would find it difficult to "live in a dictatorship" (T.). These items, if true, would tend to establish statutory eligibility. There was, however, no offer of proof of facts to show that she merited the favorable exercise of discretion, nor were there any equities toward this end contained in the record of the proceedings already before the Board. To the contrary, the record indicated that the alien had managed to accumulate her seven years physical presence by having resorted to a series of tactics aimed only at delay. These included a petition for review, several motions for discre-

tionary relief, a claim for political asylum and a District Court action, all of which were groundless as evidenced by their results. These tactics had the effect of delaying execution of the concededly valid order of deportation since 1970. The Board took note of this and determined that petitioner had failed to make a prima facie showing for reopening and denied the motion.

We submit that the Board's decision was well-grounded. The fact that the alien has resorted to dilatory tactics to extend a concededly illegal stay is a reasonable ground for the withholding of discretionary relief. *Goon Ming Wah* v. *Immigration and Naturalization Service*, 368 F.2d 292 (1st Cir. 1967); *Jimenez* v. *Barber*, 252 F.2d 550 (7th Cir. 1968). This doctrine is particularly true in this area where the favorable exercise of discretion is purely a matter of administrative grace. Cf. *Fan Wan Keung* v. *Immigration and Naturalization Service*, 434 F.2d 301 (2d Cir. 1970); *United States ex rel. Lee Pao Fen* v. *Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Lam Tat Sin* v. *Esperdy*, 334 F.2d 999 (2d Cir. 1964), *cert. denied*, 379 U.S. 901.

Congress has clearly indicated its disapproval of granting this extraordinary type of relief to aliens with histories similar to this petitioner's. In commenting upon the relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a), the Committee on the Judiciary strongly expressed its displeasure with private legislation and frivolous judicial actions brought by aliens to prevent or delay their deportation. See House Report No. 1086 appearing in U.S. Code Cong. and Admin. News, Volume 2, 1961 at page 2967 and House Report No. 1167, 89th Cong., 1st Session, October 14, 1965. Of course the Board, when making decisions, may properly take into account the Congressional policy underlying the

statute involved.* This is particularly true since Congress has retained a veto power over all approved applications for suspension of deportation.

The petitioner contends that because she offered evidence to establish statutory eligibility, the Board was required to reopen the deportation proceeding. She argues that the Board's refusal to grant her a full hearing on her application was an abuse of discretion.

We submit that the Board's decision was well supported by the record, which is virtually barren of any outstanding equity in favor of the petitioner. Indeed, by her own admission, the only possible hardship which deportation might entail involves her economic well-being. However, the Courts have consistently held that economic detriment alone is not a sufficient basis on which to qualify for relief under Section 244 of the Act, 8 U.S.C. § 1254. *Kwang Shick Myung* v. *Immigration and Naturalization Service*, 368 F.2d 330 (7th Cir. 1966); *Kasravi* v. *Immigration and Naturalization Service*, 400 F.2d 675 (9th Cir. 1968); *Lacer* v. *Immigration and Naturalization Service*, 388 F.2d 68 (9th Cir. 1968); *Yuing Ying Cheung* v. *Immigration and Naturalization Service*, 422 F.2d 43 (3d Cir. 1970).

A review of the record in the petitioner's case shows that the motion to reopen was based on alleged economic difficulties she would encounter if forced to leave the United States. In her affidavit in support of the motion to reopen she stated that she would have no job if she returned to the Philippines and has no expectations of finding a job in the Philippine (T. . . .). On the other hand, this same affidavit of petitioner reflected that the only family she has in the United States is a lawful per-

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* See *Hintopoulos* v. *Shaughnessy*, *supra*.

manent resident sister, that her parents* and two brothers reside in the Philippines and that she does not have any substantial assets in the United States.

The petitioner further contends that in denying her motion the Board deprived her of the opportunity to have the Immigration Judge pass on her application for suspension of deportation and the evidence submitted in support thereof. However, in passing on cases within its jurisdiction, the Board is expressly authorized to exercise any of the Attorney General's authority and discretion appropriate and necessary to the disposition of a case. 8 C.F.R. 3.1(d). It has long been the practice of the Board to make its own determination on questions of both law and fact and on whether discretionary relief should be granted. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 278, n.2 (1966); *DeLucia* v. *Immigration and Naturalization Service*, 370 F.2d 305, 308 (7th Cir. 1966), *cert. denied*, 386 U.S. 912. In the present case, involving a motion to reopen, there is an additional express grant of power to the Board in 8 C.F.R. 3.2 which requires evaluation of profferred evidence before such a motion can be granted.

D. Scope of review.

The only issue presented in this petition for review is whether or not the Board abused its discretionary authority in denying the petitioner's motion to reopen. As we have indicated, the grant or denial of a motion to reopen is discretionary. *Novinc* v. *Immigration and Naturalization Service*, 371 F.2d 272 (2d Cir. 1967). The scope of judicial review is extremely narrow. *Muskardin* v. *Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *Zupicich* v. *Esperdy*, 319 F.2d 773

* Petitioner's mother apparently entered the United States on a visitor's visa at about the time the motion to reopen was made.

(2d Cir. 1963). Where, as here, the evidence offered would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1068).

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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MARY P. MAGUIRE,
Special Assistant United States Attorney,
Of Counsel.

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 75-4073

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 7th day of November 1975 s he served a copy of the within respondents brief

by placing the same in a properly postpaid franked envelope addressed:

Barry, Barry & Barry, Esqs.,
One Hunter St.
Long Island City, NY 11101

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Annex, Foley Square, Borough of Manhattan, City of New York.
One St. Andrews Plaza

Pauline P. Troia

Sworn to before me this
7th day of November 19 75

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977